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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

ANGELO MACK,

Defendant and Appellant.

B265311

(Los Angeles County
Super. Ct. No. TA048568)

APPEAL from an order of the Superior Court of Los Angeles County, William C. Ryan, Judge. Affirmed.

Jonathan B. Steiner, Executive Director and Richard B. Lennon under appointments by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Noah P. Hill and Viet H. Nguyen, Deputy Attorneys General, for Plaintiff and Respondent.

On December 3, 1997, a jury convicted defendant, Angelo Mack, of being a felon in possession of a firearm. (Former Pen. Code¹, § 12021, subd. (a)(1).) Former section 12021, subdivision (a)(1) has been continued without substantive change in section 29800, subdivision (a)(1). (Stats. 2010, ch. 711, §§ 4, 6.) The information alleged, “On or about November 3, 1996 . . . the crime of POSSESSION OF FIREARM BY A FELON – PRIOR(S) . . . was committed by ANGELO MACK, who did unlawfully own, possess and have custody and control of a firearm” The jury’s verdict reads, “We, the jury in the above-entitled action, find the defendant, ANGELO MACK[,], guilty of the crime of POSSESSION OF FIREARM BY A FELON, in violation of Penal Code Section, 12021(A)(1), a felony, as charged in Count 1 of the Information.” Defendant was found to have sustained three prior robbery convictions within the meaning of sections 667, subdivision (d), and 1170.12, subdivision (b). On May 7, 1998, defendant was sentenced to 25 years to life in state prison.

Defendant appeals from the June 11, 2015 order denying his section 1170.126 resentencing petition. Defendant argues we should disagree with consistent existing authority and reverse the June 11, 2015 order. We, however, affirm the order. As the trial court found, defendant is disqualified from resentencing because, “during the commission of the current offense, [he] . . . was armed with a firearm” (§§ 667, subd. (e)(2)(C)(iii); 1170.12, subd. (c)(2)(C)(iii); 1170.126, subd. (e)(2).) Being armed with a firearm in this context means having the weapon available for use, either offensively or defensively. (*People v. Bland* (1995) 10 Cal.4th 991, 997; *People v. Brimmer* (2014) 230 Cal.App.4th 782, 793-796; *People v. Blakely* (2014) 225 Cal.App.4th 1042, 1051-1052; *People v. Osuna* (2014) 225 Cal.App.4th 1020, 1028-1029.)

The trial court properly considered the reporter’s transcript of defendant’s trial in determining he was armed with a firearm in the commission of the current offense. (*People v. Brimmer, supra*, 230 Cal.App.4th at pp. 799-801; *People v. Blakely, supra*,

¹ All further statutory references are to the Penal Code.

225 Cal.App.4th at p. 1063; see *People v. White* (2014) 223 Cal.App.4th 512, 525.) Deputy Marcello Sampedro testified defendant threw a gun into a parking lot. Deputy Sampedro immediately recovered the handgun. The Courts of Appeal agree that a firearm possession by a felon conviction is a disqualifying circumstance in a case where the accused factually was armed with that weapon. (*People v. Hicks* (2014) 231 Cal.App.4th 275, 283-284; *People v. Brimmer, supra*, 230 Cal.App.4th at pp. 797-799; *People v. Elder* (2014) 227 Cal.App.4th 1308, 1312-1314; *People v. Blakely, supra*, 225 Cal.App.4th at p. 1054; *People v. Osuna, supra*, 225 Cal.App.4th at pp. 1029-1032; *People v. White, supra*, 223 Cal.App.4th at pp. 519, 525.) There is no pleading and proof requirement with respect to this disqualifying factor. (*People v. Brimmer, supra*, 230 Cal.App.4th at pp. 801-803; *People v. Elder, supra*, 227 Cal.App.4th at pp. 1314-1316; *People v. Blakely, supra*, 225 Cal.App.4th at pp. 1057-1059; *People v. Osuna, supra*, 225 Cal.App.4th at p. 1033-1038; *People v. White, supra*, 223 Cal.App.4th at pp. 519, 526-527.) Further, *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 and its progeny do not apply to *this* resentencing eligibility determination. (*People v. Brimmer, supra*, 230 Cal.App.4th at pp. 803-805; *People v. Blakely, supra*, 225 Cal.App.4th at pp. 1059-1063; *People v. Osuna, supra*, 225 Cal.App.4th at pp. 1038-1040.)

The June 11, 2015 order is affirmed.

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TURNER, P.J.

We concur:

KRIEGLER, J.

BAKER, J.